



Memorandum

Date: July 13, 2004

To: Rebecca Lind, Principal Planner, City of Renton;

From: Lisa Grueter, Senior Planner

Subject: Renton Best Available Science Critical Areas Regulations and Shoreline Master Program GMA Integration

INTRODUCTION

Renton is a long established community in the heart of urban King County. The City was founded along the Cedar and Black Rivers and Lake Washington, and incorporated as a City in 1901. Once dependent upon mining and forestry, it is noted for aerospace and truck manufacturing and a transitioning diversified economy. It is home to the Boeing Renton plant, PACCAR, Renton Technical College, Valley Medical Center, the Renton Airport, and many other establishments. A variety of residential neighborhoods, from the historic and revitalizing downtown to the suburban Renton Highlands are found here.

With its important regional economy, location at the connection of the I-405, SR-167 and SR-900 highways, active citizens and neighborhoods, and many other features, the City has a long history of long-range and strategic planning. While being a largely urbanized community, the City has proactively established a park, recreation, and open space system, including the purchase of environmentally sensitive areas, particularly along the Black River, the Cedar River, and Springbrook Creek. The City prepared a new Comprehensive Plan consistent with the State of Washington Growth Management Act (GMA) in 1995 addressing land use, transportation, housing, utilities, capital facilities, economic development, downtown, environment, and other key community topics. The City participates in regional planning forums such as the Growth Management Planning Council of King County and watershed planning efforts (WRIAs).

The Washington State GMA provides that local governments should manage growth by discouraging sprawl, accommodating a range of housing types and employment, and protecting environmentally sensitive areas, among other goals (RCW 36.70A.020). GMA has specific requirements that the City protect: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas (RCW 36.70A.030). Since the original GMA was instituted in 1991, GMA has been amended with respect to critical areas, particularly to require the use of “best available science” in critical area policies and regulations and consideration of anadromous fish species.

Partly in response to GMA, the City of Renton adopted Critical Area Regulations between 1989 and 2000. The City regulations currently address:

- Aquifer Protection Areas
- Geologically Hazardous Areas
- Habitat Conservation Areas
- Frequently Flooded Areas; and
- Wetlands

The City Critical Area Regulations “reserve” a section to address the protection of streams and lakes, which otherwise are minimally addressed in the City’s Tree Cutting and Land Clearing regulations (25 foot setback from waterbodies).

Given the status of the stream regulations, the focus of the City’s efforts to comply with the GMA best available science provisions relates to streams, and a series of recommendations by the consultant team have been prepared to establish water classifications, buffers, and other related items. However, to document the City’s compliance with best available science for the remaining GMA critical area topics and effectively use the City’s resources, more limited scope reviews and evaluations have been conducted. These limited scope reviews include a best available science evaluation of wetland regulations, as well as a comparison of the City’s aquifer, flood hazard, geologic hazard, and habitat conservation regulations to the State Department of Community Development’s Example Critical Areas Code.

The City is considering its community vision and State planning requirements as it revisits its Comprehensive Plan and development regulations consistent with the recent requirements of the GMA.

STATE PLANNING REQUIREMENTS

The City’s Renton Best Available Science Critical Areas Regulations and Shoreline Master Program GMA Integration project was initiated to assist the City meet several statutory requirements or local programs as follows:

- Growth Management Act (GMA): The GMA includes requirements for both critical areas and Shorelines of the State. The GMA states in RCW 36.70A.480 that a jurisdiction’s Shoreline Master Program policies are an element of a jurisdiction’s Comprehensive Plan and that Shoreline Master Program regulations are a part of the jurisdiction’s development regulations.

The GMA also requires critical areas to be protected by ordinance. For a jurisdiction subject to the Act, RCW 36.70A.172 and WAC 365-195-900 requires the use of best available science in the formulation of policies and regulations with particular attention to be paid to protection of anadromous fish. Requirements for best available science are to be integrated

into plans and regulations by December 1, 2004 according to the GMA plan review cycle requirements.

Washington State legislation (ESHB 1933) was passed in Spring 2003 to respond to the recent Growth Management Hearings Board Case involving the City of Everett. It clarified the distinction between GMA and Shoreline Management Act (SMA) provisions to protect critical areas. Essentially, it says that regulated shorelines are not automatically critical areas unless they meet GMA definitions of critical areas, and best available science requirements do not apply to regulated Shorelines of the State. Rather the SMA provisions regarding ecological protection apply (SMA requires use of science in developing master programs). It does say that Shoreline Master Program regulations to protect critical areas must be at least *equivalent* to the protections in the local government's critical areas regulations, but it may be more stringent within the shoreline jurisdiction. With this last provision in ESHB 1933, and due to the need to address Endangered Species Act effects on the City plans, programs, and regulations, it will still be important to determine appropriate shoreline standards along the City's Shorelines regulated under the Shoreline Management Act.

- Shoreline Management Act (SMA): The SMA applies to the City along with Washington State Department of Ecology (DOE) rules for Shoreline Master Programs recently adopted in December 2003. For example,
 - RCW 90.58.100 requires that two topic areas be addressed in Shoreline Master Programs, which the City still needs to address: Historic/Cultural/Scientific/Educational and Flood Damage Prevention.
 - WAC 173-26-160 requires that upon annexation, annexed Shorelines of the State should be addressed in local Shoreline Master Programs within 1 year. In 1985/1988, the City annexed the Maplewood Golf Course and Ron Regis Park area, but did not amend the Shoreline Master Program. Part of the scope of services addresses Shoreline Environment Map Designation inconsistencies including amendments to correct mapping inconsistencies for the Black River (location of Natural Environment in text versus map) and Cedar River (Golf Course - annexation), as well as to clarify generally whether Shoreline Environment classifications extend to the aquatic portion of the lakes/streams.
 - Allowable Uses and Activities in Regulated Shorelines. RCW 90.58.020 gives use priorities for Shorelines of the State including Shorelines of Statewide Significance (e.g. Lake Washington). Based upon an earlier DOE case study of Renton Shoreline Master Program policies, the City's policies do not distinguish between policies for Shorelines of the State and the subset of Shorelines of Statewide Significance.
- City Endangered Species Act (ESA) Strategy: The City Council has authorized a City ESA strategy to minimize risks associated with Federal ESA third party lawsuits regarding "takes" of listed species. Part of the City's ESA strategy includes a review of City Critical Area Regulations (action CA-1) identified as a high priority, and for completion by 2004.

CASE LAW

Several recent and relevant Growth Management Hearings Board or State of Washington Appellate Court Cases address best available science. These cases are part of the planning and regulatory context under consideration as the City develops critical area policies and code amendments. Three key cases include:

- Honesty in Environmental Analysis and Legislation (HEAL), Et Al., Respondents, v. Central Puget Sound Growth Management Hearings Board, Defendant, the City of Seattle, Appellant. June 1999, 96 Wn. App., pp. 522 +.
- Whidbey Environmental Action Network (WEAN), Appellant v. Island County, Respondent. Court of Appeals Division I, State of Washington, Opinion Information Sheet, Docket Number 50736-2-I. File Date 09/29/2003.
- Larson Beach Neighbors and Jeanie Wagenman, Petitioner, v. Stevens County, Respondent, Department of Ecology, Intervenor. Growth Management Hearings Board for Eastern Washington, Final Decision and Order, Case No. 03-1-0003, February 10, 2004.

Generally, these cases indicate that:

- Evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.
- Critical area buffers should be within the range of scientific studies and based upon a range of functions that the buffers provide (not a single function).
- Critical area definitions, exemptions, and application/review procedures should provide for best available science critical areas protection.

Table 1 summarizes key sections of the best available science cases.

Table 1. Growth Management Hearings Board Decisions and State Appellate Court Case Law Summaries – Best Available Science

Best Available Science Decision/Case Law Summaries
<p><i>Whether the “consideration” of BAS is procedural or substantive and whether BAS is to be considered as a primary goal or as part of all GMA goals.</i></p> <ul style="list-style-type: none"> ▪ HEAL v. Hearings Bd.: “In developing critical areas policies and regulations, a city or county must include in the record the best available science, as a factor to be considered along with all other factors mandated to be considered by the Growth Management Act, 36.70A RCW. ... <ul style="list-style-type: none"> ○ ...[T]he Legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence not on speculation and surmise. (emphasis added) ○ ...We hold that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. (emphasis added) ○ ...While the balancing of the many factors and goals could mean the scientific evidence does not play a major role in the final policy in some GMA contexts, it is hard to imagine in the context of critical areas. The policies at issue here deal with critical areas, which are deemed "critical" because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.”
<p><i>How the establishment of stream and wetland buffers should be within the range of scientific studies and based upon a range of functions that the buffers provide.</i></p> <ul style="list-style-type: none"> ▪ WEAN v. Whidbey Environmental Action Network, Appellant v. Island County. <ul style="list-style-type: none"> ○ A type 5 stream is a stream that is less than two feet wide and does not support salmon or other fish... Type 5 streams usually run dry during some part of the year. The County recommended a 25-foot buffer for this type of stream. Responding to the Board's [Final Decision and Order] FDO determination of noncompliance, the County required a 50-foot buffer for any type 5 stream tributary to a salmon bearing stream and for any type 5 stream located in the rural zone... But the Board determined that the County was still noncompliant and ordered it to require 50-foot buffers for all type 5 streams, without qualification. While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams. ... <i>the GMA requires that the regulations for critical areas must protect the 'functions and values' of those designated areas... This means all functions and values.</i> (emphasis added) ○ A type 4 stream is a stream that is two feet or wider at its ordinary high water mark... It is not used by a significant number of fish and its primary importance is protecting water quality downstream... The County recommended 50-foot buffers for type 4 streams... A type 3 stream is a stream that has anadromous fish (salmon) and is five feet or wider, or bears resident game fish and is 10 feet or wider... The County recommended 75-foot buffers for type 3 streams without anadromous fish and a 100-foot buffer for type 3 streams with anadromous fish... WEAN argues that these buffer widths are smaller than the 100 foot minimum for all streams recommended by the scientific community. WEAN directs us to the same analysis and arguments it used concerning type 5 streams above. <i>Our review of BAS before the Board supports the conclusion that the County was in compliance concerning type 3 and 4 stream buffers because BAS does not require a 100-foot minimum for all streams.</i> (emphasis added) ○ [Wetland Category B] The record is clear that, according to BAS a wetland buffer of at least 50 feet is necessary to provide wildlife protection. ...if the County is relying in part on Category B wetlands and their 25-foot buffers to protect wildlife functions, the County is not in compliance with the Act.

Best Available Science Decision/Case Law Summaries

Documentation unique local conditions justifying a departure downward from the buffer width requirements outlined in the scientific literature.

- Larson Beach Neighbors and Jeanie Wagenman v. Stevens County.
 - Stevens County contracted with Mr. Bud Kovalchik, a wetlands consultant with over 20 years experience as a wetland/riparian ecologist with the U.S. Forest Service, to review the BAS and make recommendations regarding appropriate protections for wetlands and riparian areas in Stevens County. ..Mr. Kovalchik's did make a credible effort to develop a record of examining BAS and preparing recommendations for the County. ... with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.¹ ...The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. ...*Stevens County failed to substantively include BAS in establishing minimum riparian buffers and wetland setbacks, and failed to include in the Record the scientific basis for deviation from BAS recommendations.* (emphasis added)

Ensuring that definitions, exemptions, and procedures provides for BAS protection of critical areas.

- Larson Beach Neighbors and Jeanie Wagenman v. Stevens County.
 - Title 13 fails to adequately define wetlands, erroneously excluding wetlands created by construction of roads or railroads prior to 1990, in violation of RCW 36.70A.030(20).
 - Title 13 erroneously exempts wetlands in Categories 2 and 3 containing less than 2,500 square feet and category 4 wetlands containing less than 10,000 square feet, thus failing to meet the requirements of the GMA to protect critical areas, RCW 36.70A.170(d), utilizing best available science, RCW 36.70A.172.
 - Provisions in Title 13 authorizing exemptions from the protections afforded in the Title for "reasonable use" without providing a definition of "reasonable" or giving standards for such use to be measured by, fail to protect critical areas, in violation of RCW 36.70A.170.
 - Provisions in Title 13 authorizing mitigation for critical areas degradation without requiring review by a qualified professional fail to protect critical areas, in violation of RCW 36.70A.170.
 - Provisions in Title 13 authorizing a 30% increase in structure expansion toward the shoreline for non-conforming structures, fail to protect critical areas, in violation of RCW 36.70A.170.
 - [Although] Stevens County relies on State, Federal, and Health District regulations to protect CARA's... Title 13 has no provisions that initiate designation or protection of Critical Aquifer Recharge Areas (CARA's), thus failing to protect critical areas in violation of RCW 36.70A.170.
 - Provisions in Title 13 that exclude existing and ongoing agricultural activities fail to protect critical areas in violation of RCW 36.70A.170.

¹ A table of the recommendations of the Planning Commission and Mr. Kovalchik, compared to Title 13 is shown below:

Wetland Category	Recommended Buffer	Adopted Buffer (Title 13)	Stream Category	Recommended Buffer	Adopted Buffer (Title 13)
1	200	200	1	150	100
2	150	100	2	150	100
3	100	50	3	100	75
4	50	25	4	100	50
			5	50	25

WORK PROGRAM

The purpose of the City of Renton Best Available Science Critical Areas Regulations and Shoreline Master Program GMA Integration project is to meet Growth Management Act (GMA), Shoreline Management Act (SMA), and City Comprehensive Plan goals for critical area protection in the City of Renton context. Specific objectives are to:

- Refine City Comprehensive Plan policies in light of Best Available Science particularly the Environment Element.
- Provide a best available science literature review addressing streams/rivers, and lakes, and based upon the literature review develop buffer requirements. The review program includes recommendations to amend the Renton Critical Areas Regulations to classify water bodies, apply buffers, and provide for no-net-loss of ecological function.
- Document a best available science review of the City's wetland regulations, and provide for appropriate amendments to improve or better document the wetland review process.
- Compare the City's aquifer protection, flood hazard, geologic hazard, and habitat conservation regulations against the State of Washington Department of Community, Trade, and Economic Development Example Critical Areas Code and propose amendments as appropriate.
- Propose limited Shoreline Master Program amendments to integrate Shoreline and Comprehensive Plan policies, address text and map inconsistencies, and provide for shoreline protection regulations. These limited amendments would apply in the interim until full Shoreline Master Program Update is accomplished in accordance with the new SMA schedule (2009 for the City of Renton):
 - Integrate Shoreline Master Program Goals and Policies into the City Comprehensive Plan, essentially intact. Limited policy amendments are proposed to address use priorities of RCW 90.58.020 (differentiate between Shorelines of Statewide Significance and all other Shorelines of the State that are found in the City).
 - Amend Use Environments Map for the Black River and Cedar River at the Maplewood Golf Course to address Shoreline Master Program text/map conflicts and an unclassified annexed area. Field review and analysis were conducted for the limited map amendments. For these areas regulations would be applied consistent with environmental limitations and existing uses.
 - Address shoreline protection regulations, including buffers, in the Shoreline Master Program to provide for equivalent protection per State legislation (ESHB 1933), while responding to use priorities of RCW 90.58.020.

The work program has produced a variety of documents and issue papers:

- “Renton Best Available Science Critical Areas Regulations and Shoreline Master Program GMA Integration,” Jones & Stokes, July 13, 2004.
- Draft “City of Renton Best Available Science Literature Review and Stream Buffer Recommendations,” prepared by AC Kindig & Company and Cedarock Consultants, Inc. on February 27, 2003.
- Stream/lake classification results are included in the 2003 draft Renton Water Class Map prepared by AC Kindig & Company and Cedarock, in conjunction with Renton Neighborhoods & Strategic Planning staff.
- “Proposed Renton Comprehensive Plan and Shoreline Master Program Policy Amendments,” Jones & Stokes, July 13, 2004.
- “Proposed Renton Shoreline Master Program Use Environment Amendments,” Jones & Stokes, March 8, 2004.
- “Transmittal of Parametrix Review of Wetlands Regulations,” Jones & Stokes, July 13, 2004; together with “Best Available Science Ordinance Review” by Jim Kelly, PhD, Parametrix, June 28, 2004.
- “Overview and Comparison of Aquifer, Flood Hazard, Geologic Hazard, and Habitat Conservation Regulations to State Example Critical Areas Code,” Jones & Stokes, July 13, 2004.
- “Revised Review Draft -- Renton Critical Area Ordinance and Shoreline Master Program Regulation Amendments,” Jones & Stokes, July 13, 2004. Includes proposed code amendments.

Each of these documents is available under separate cover from the Renton Economic Development/Neighborhoods/Strategic Planning Department, as well as the City of Renton website (www.ci.renton.wa.us/, under the Department name).

PREVIOUS AND NEXT STEPS

The City’s work program efforts began in November 2002, including inventories, policy reviews, and concept formulation. A multi-department Staff review team has reviewed preliminary draft concepts in 2003 and 2004. The Planning Commission was briefed in 2003 and 2004 regarding work program elements, and will continue to be briefed as part of the Comprehensive Plan Update review process in 2004. The City Council has also received briefings in 2004.

Additionally, informal agency consultation with the State Department of Ecology occurred in March 2004 and comments were received in May 2004. Subsequently, agency involvement activities will be occurring through the Notice of Application and State Environmental Policy

Act (SEPA) Review process and GMA comment periods on Comprehensive Plan and Development Regulation amendments.

It is anticipated that the Comprehensive Plan Update including the Renton Best Available Science Critical Areas Regulations and Shoreline Master Program GMA Integration project will be adopted by December 2004 to comply with GMA deadlines.

Prior to adoption, opportunities for public review will include:

- Notice of Application comment period in July 2004;
- Public open houses/meetings in Summer 2004 (particularly July 27, 2004, Highlands Community Center, 6 p.m.);
- Planning Commission and City Council meetings and hearings in Summer and Fall 2004.

Additional information can be obtained at the City's website under the Renton Economic Development/Neighborhoods/Strategic Planning Department page (www.ci.renton.wa.us/).